

## Update: Sexual Assault Benchbook

### CHAPTER 4

#### Defenses To Sexual Assault Crimes

##### 4.8 Duress

###### C. Burden of Proof

Insert the following text at the bottom of page 223:

In *People v McKinney*, \_\_\_ Mich App \_\_\_ (2003), the defendant was convicted of possession of over 650 grams of cocaine, possession with intent to deliver over 650 grams of cocaine, being a felon in possession of a firearm, maintaining a drug house, and possession of a firearm during the commission of a felony. The defendant's convictions resulted from evidence discovered during the execution of a search warrant in the apartment where the defendant resided with her boyfriend. The defendant was in the apartment when the search warrant was executed. The police confiscated two large bags of cocaine found inside a dresser that contained women's clothing. The defendant denied seeing any cocaine in the apartment or assisting her boyfriend in selling or packaging the cocaine. At trial, the defendant requested a jury instruction on duress based on allegations that her boyfriend was abusive and that she continued to live with him because she feared his reprisals. The defendant argued that a duress instruction was necessary to rebut the presumption that the defendant must have been helping her boyfriend given her presence in the apartment and the large amount of drugs that were discovered. The trial court declined to give the duress instruction because the defendant denied committing the crime. The Court of Appeals upheld the trial court's ruling and stated the following:

“In [*People v*] *Lemons*, [454 Mich 234 (1997)], the Supreme Court affirmed the trial court's refusal to provide an instruction on duress where the defendant denied that any crime took place. As noted by *Lemons, supra* at 249, such testimony does not ‘meet the burden on the defense to come forward with some evidence that the defendant did the act and chose to do so out of a reasonable and actual

belief that it was the lesser of two evils.’ In the instant case, defendant expressly denied *ever* assisting [her boyfriend] in the sale or packaging of narcotics. . . . We further note that the jury was instructed that defendant’s mere knowledge of the presence of cocaine in the apartment was insufficient to establish possession. Accordingly, the trial court acted within its discretion when it declined to give the requested duress instruction. See *id.* at 249.” *McKinney, supra* at \_\_\_\_.

## CHAPTER 7

### General Evidence

#### 7.4 Selected Hearsay Rules (and Exceptions)

##### **D. Statements of Existing Mental, Emotional, or Physical Condition—MRE 803(3)**

Insert the following language in the fourth paragraph of subsection D, after the first sentence, on page 345:

In *People v Coy*, \_\_\_ Mich App \_\_\_ (2003), a witness testified that the murder victim told her that she had planned to meet the defendant on the night of the murder and asked her to page the defendant to remind him about the meeting. The trial court found the statement relevant to the victim's intention or plan to meet the defendant at her apartment on the night of the murder and was therefore admissible pursuant to MRE 803(3). The Court of Appeals upheld the trial court's determination and indicated that the victim's statement of future intent or plan to meet with defendant on the night of her murder fell within the plain meaning of MRE 803(3). \_\_\_ Mich App at \_\_\_.

## CHAPTER 7

### General Evidence

#### 7.13 Polygraphs

##### A. Testing Rights

###### 1. Defendants Charged With Criminal Sexual Conduct Offenses

Replace the first four sentences in the second paragraph on page 378 with the following text:

A defendant who “allegedly has committed” an enumerated CSC violation does not lose the right to request a polygraph examination until a finding of guilt. See *People v Phillips*, \_\_\_ Mich \_\_\_ (2003) (holding that a defendant who requests a polygraph after the conclusion of proofs but before the jury returns a verdict does not forfeit the right to a polygraph, although the defendant would not be entitled to a new trial or a polygraph unless he or she can demonstrate that the error was outcome determinative).

## CHAPTER 8

### Scientific Evidence

#### 8.2 Expert Testimony in Sexual Assault Cases

##### A. General Requirements for Admissibility of Expert Testimony

Please replace the text regarding MRE 703 on page 401 with the following:

Effective September 1, 2003, MRE 703 was amended by Michigan Supreme Court . MRE 703 now states:

“The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.”

## CHAPTER 8

### Scientific Evidence

#### 8.6 DNA Testing and Admissibility

##### J. DNA Statistical Interpretation Evidence

##### 2. When DNA Evidence Must Be Supplemented With Statistical Analysis

Insert the following text at the end of the text on page 431:

After the Court of Appeals issued its decision in *People v Coy (Coy I)*, 243 Mich App 283 (2000), the defendant was retried on the same charges. *People v Coy (Coy II)*, \_\_\_ Mich App \_\_\_ (2003). Prior to the second trial, the trial court held an evidentiary hearing regarding the admissibility of the mixed sample DNA evidence. At the hearing, the technical director of the testing laboratory testified that the probabilities on the mixed sample were calculated according to the recommendations of the DNA Advisory Board utilizing a computer program developed by the FBI. The technical director indicated that the statistical calculations at issue are not new or novel, are used in many areas, and are accepted by the scientific community. Another expert explained the ratios, their acceptance, reliability, and how they are used in many areas other than forensic DNA or forensic genetic testing. At the close of the evidentiary hearing, the trial court concluded that the admissibility of DNA evidence and statistical evidence concerning DNA has been established throughout Michigan and the United States. Subsequently, the DNA evidence and statistical evidence was introduced at trial, and the defendant was convicted of voluntary manslaughter. The defendant appealed, claiming the trial court erroneously admitted the statistical analysis of the DNA profiles developed from the mixed blood samples. *Coy II, supra* at \_\_\_\_\_. The Court of Appeals upheld the trial court's decision to admit the DNA statistical evidence. The Court of Appeals stated:

“In this case, the trial court correctly found no novel scientific techniques or principles at issue such that a *Davis-Frye* analysis was necessary. Our courts firmly accept PCR testing of evidence to obtain DNA profiles. *Coy, supra* at 292. In addition, the premise of this Court's prior opinion is that statistics are an integral part of DNA evidence and are necessary to assist the trier of fact. *Id.* at 297-302.” *Coy II, supra* at \_\_\_\_\_.

## CHAPTER 9

### Post-Conviction and Sentencing Matters

#### 9.5 Imposition of Sentence

##### B. Sentencing Guidelines

###### 1. Guideline Framework

Insert the following text after the third full paragraph on page 454:

In *People v Babcock (Babcock III)*, \_\_\_ Mich \_\_\_ (2003), the Michigan Supreme Court issued its first comprehensive interpretation of the legislative sentencing guidelines. In *Babcock*, the trial court made a downward departure from the sentencing guidelines. The prosecutor appealed, and in *People v Babcock (Babcock II)*, 250 Mich App 463 (2002), the Court of Appeals affirmed the sentence indicating that although some factors cited by the trial court were not objective and verifiable, the trial court did not abuse its discretion by departing from the guidelines. The prosecutor filed an application for leave to appeal. The Supreme Court granted leave and concluded\*:

“[T]he Court of Appeals concluded that some of the reasons articulated by the trial court were not objective and verifiable. As explained above, if a reason is not objective and verifiable, it cannot constitute a substantial and compelling reason. As also explained above, if the trial court articulates multiple reasons, and the Court of Appeals, as in this case, determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, the Court must remand the case to the trial court for resentencing or rearticulation. Because the Court of Appeals in this case did not determine whether the trial court would have departed, and would have departed to the same degree, absent consideration of the reasons that the Court of Appeals found to be not objective and verifiable, we reverse its judgment and remand this case to the Court of Appeals for further consideration.” [Footnotes omitted.] *Babcock III*, *supra* at \_\_\_\_.

\*Justices Markman, Kelly, and Taylor signed the lead opinion. Chief Justice Corrigan concurred in part and dissented in part, as explained below, and Justice Young signed the Chief Justice’s opinion. Justice Cavanagh and Justice Weaver also concurred in part and dissented from the majority’s requirement that the factors allowing for departure be “objective and verifiable.”

\*The Court of Appeals has stated that “[b]ecause a majority of the justices writing separately concurred with most of the lead opinion except one or two parts specifically stated in those separate opinions, we conclude that a majority of justices concurred with the appendix. Thus, the appendix is binding law.” *People v Lowery*, \_\_\_ Mich App \_\_\_, \_\_\_ n 3 (2003).

In order to assist the bench and bar, the Supreme Court included an appendix to the opinion.\* The appendix summarizes the responsibilities of the trial court and the Court of Appeals under the statutory sentencing guidelines as follows:

“1. A trial court is required to choose a minimum sentence within the guidelines range, unless there is a substantial and compelling reason for departing from this range. MCL 769.34(2), (3).

“2. If a trial court’s sentence is within the guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant’s sentence. MCL 769.34(10).

“3. A substantial and compelling reason must be ‘objective and verifiable’; must “‘keenly’ or ‘irresistibly’ grab our attention”; and must be “of ‘considerable worth’ in deciding the length of a sentence.”” [*People v Fields*, [448 Mich 58, 62, 67 (1995)].

“4. A trial court must articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies that departure. MCL 769.34(3); *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000).

“5. A trial court ‘shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.’ MCL 769.34(3)(b).

“6. In considering whether, and to what extent, to depart from the guidelines range, a trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range. MCL 769.34(3).

“7. In reviewing sentencing decisions, the Court of Appeals may not affirm a sentence on the basis that, although the trial court did not articulate a substantial and compelling reason for a departure, one nonetheless exists in the judgment of the Court of Appeals. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing. MCL 769.34(3); MCL 769.34(11).

“8. If a trial court articulates multiple ‘substantial and compelling’ reasons for a departure from the guidelines, and the Court of Appeals determines that some of these reasons are substantial and compelling and others are not, the panel must determine whether the trial court would have departed, and would have departed to



the same degree, on the basis of the substantial and compelling reasons alone. MCL 769.34(3).

“9. If a trial court departs from the guidelines range, and its sentence is not based on a substantial and compelling reason to justify the *particular* departure, i.e., the sentence is not proportionate to the seriousness of the defendant’s conduct and his criminal history, the Court of Appeals must remand to the trial court for resentencing. MCL 769.34(11).

“10. “[T]he existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error.” *Babcock I*, [244 Mich App 64, 75-76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 77 (1995)].

“11. “The determination that a particular [sentencing] factor is objective and verifiable should be reviewed by the appellate court as a matter of law.” *Babcock I*, [244 Mich App 64, 76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 78 (1995)].

“12. “A trial court’s determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.” *Babcock I*, [244 Mich App 64, 76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 78 (1995)]. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Id.* at \_\_\_\_.

Chief Justice Corrigan dissented from the majority’s requirement that the Court of Appeals remand a case to the trial court “if the trial court articulates multiple reasons [for departure], and the appellate court . . . determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons . . .” *Babcock III, supra* at \_\_\_\_\_. This requirement may force the Court of Appeals to remand a large number of cases to the trial courts for resentencing or rearticulation. In an effort to mitigate the number of cases that would be remanded, Chief Justice Corrigan strongly urges that every trial judge add the following disclaimer to every judgment of sentence that departs from the guidelines:

“I am persuaded that the defendant should serve the sentence I have rendered and it is my intention that this sentence be sustained if an appellate court determines that any of my rationales for departure survive review.” *Id.* at \_\_\_\_.